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No. 100

In the Supreme Court of the United States

DION TYRONE DIAMOND,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Louisiana

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

ARGUMENT

IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM. (Constitution 1921, Art. 1, Sec. 10, Louisiana Constitution)

In view of the above-cited constitutional article, the Louisiana Legislature has provided in LSA-R.S. 14:227, as follows:

> "The indictment must state every fact and circumstance necessary to constitute the offense, but it need do no more, and it is immaterial whether the language of the statute creating the offense, or words unequivocally conveying the meaning of the statute, be used."

18 USC, Rule 7C, the federal counterpart of the foregoing-cited Louisiana statute, states:

> "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charge . . ."

Further quoting the foregoing provision:

> ". . . Error in the citation or its ommission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

> "The statute on which an indictment is found ed must be determined from the facts charged in the indictment and the facts, as pleaded, must bring the offense charged within one statute although another statute is referred to in the indictment." *Masi v. U.S.*, C.A. Fla. 1955, 223 Fed. 2nd 132, Certiorari denied 76 Sup. Ct. 208, 350 U.S. 919, 100 L. Ed. 805; *U.S. v. McKnight*, C.A., New York 1958, 253 Fed. 2d 817.

> "An indictment need not show upon which statute it is based." *Bugg v. U.S.*, Circuit Ct. of Appeals, Mo. 1944, 140 Fed. 2d 848, Certiorari denied, 65 Sup. Ct. 89, 323 U.S. 673, 89 L. Ed. 547.

Thus, from the foregoing authorities, federal and state, it is contended that the validity with reference to the averments of the bill of information are to be determined by the factual averments therein, and that nothing else is required; but that, factually, the averments amount to a violation of some statute. A reading of LSA-R.S. 14:103 and the bill of information herein

filed and upon which this prosecution was based will readily inform anyone what section or sections of LSA-R.S. 14:103 the factual averments of this bill of information fall within. Petitioner's complaint that the particular section or sub-section is not set forth in the bill of information is of no con equence. A reading of LSA-R.S. 14:03 (A) 1-7, and a reading of the bill of information herein filed against petitioner, factually, circumstantially and expressly reveals that petitioner was charged with the violation of R. S. 14:103 (a) 5 and 6, and a reference to the transcript will readily reveal that the evidence overwhelmingly supports violations by petitioner of these two particular sections.

THE DISTRICT ATTORNEY, IF REQUESTED BY THE ACCUSED PRIOR TO ARRAIGNMENT MAY BE REQUIRED BY THE JUDGE TO FURNISH A BILL OF PARTICULARS SETTING UP MORE SPECIFICALLY THE NATURE OF THE OFFENSE CHARGED. R.S. 15:235 (last paragraph).

Although petitioner filed an application for a bill of particulars, (R-14), the information that he sought therein was information of evidentiary nature to which he was clearly not entitled. It is to be noted that in said application, petitioner did not request that he be furnished with the citation of the statute under which he was charged. 18 USC, Rule 7 (F), the federal counterpart of R. S. 15:235, provides:

> "The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after

arraignment as may be prescribed by rule or order. . ."

The rule or order of the state courts of Louisiana is provided for in the last paragraph of R. S.-LSA 15:235 to the effect that an application for a bill of particulars must be requested by the accused prior to arraignment. The record in this case will clearly show that this accused not only failed to seek the citation of the laws allegedly violated and for which he was charged prior to arraignment, but at no time did he ever request said information. Further, as previously discussed, had he sought said information, both under state and federal authority, he would not have been entitled to it.

ALL PERSONS CONCERNED IN THE COMMISSION OF A CRIME, WHETHER PRESENT OR ABSENT, AND WHETHER THEY DIRECTLY COMMIT THE ACT CONSTITUTING THE OFFENSE, AID AND ABET IN ITS COMMISSION, OR DIRECTLY OR INDIRECTLY COUNSEL OR PROCURE ANOTHER TO COMMIT THE CRIME, ARE PRINCIPALS. (LSA-R.S. 14:24)

The federal counterpart to the foregoing, 18 USC 2 (a) provides:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Subsection (b) thereof further provides:

"Whoever willfully causes an act to be done which

> if directly performed by him or another would be an offense against the United States, is punishable as a principal."

A reading of the bill of information herein, it is submitted, will put anyone on notice that petitioner was charged by said bill of information under these foregoing sections, that is, as the aider, abettor, procurer or leader of the allegedly unlawful activities therein set forth.

There is no evidence in the record to refute the events of the afternoon of January 31, 1962, as set forth in petitioner's brief at page 8 filed herein. At that time, a particular meeting in session was comprised of an estimated five hundred to six hundred students (R-107). Diamond, the petitioner, was speaking to the students and told them to go through the classrooms and, if necessary, to pull the students out of the classrooms (R-63). Petitioner was pleading for more followers from the student body (R-110). He told the audience, and urged them, to go through the classrooms (R-111). Shortly thereafter, at least one hundred students began to go through the classrooms with signs. This was a noisy procession which disturbed the people in the buildings where classes were being held at that time. This noisy procession and disturbance lasted over half an hour (R-91). This noisy procession disturbed classes in progress (R-64, 65). The students at that time were pulling on doors, stomping in the halls and were disturbing the classes in session (R-110). It is not denied or refuted that petitioner, as the speaker at this demonstration and

meeting, urged and encouraged and directed his followers to go into these classrooms and, if necessary, pull the students in class therefrom and that, immediately after this speech, the students did exactly what their leader, petitioner herein, urged and encouraged and instructed them to do, that is, to march through these buildings and classrooms in which classes were being conducted, in a noisy manner, disturbing same. Petitioner takes the position that he was denied due process by this conviction for making a series of speeches under a statute too vague and indefinite to fairly described the conduct prohibited or to provide an ascertainable standard of guilt. He contends in his brief that he was tried and convicted for merely making a speech and for lawfully advocating therein. In support of the foregoing contentions, he cites *Thompson v. Collins*, 323 U.S. 516 and *Cantwell v. Connecticut*, 310 U.S. 296. A factual history of these two cited cases will reveal that the holdings thereon have no application to the case at bar.

In *Thompson v. Collins*, a Texas law was involved which required union labor organizers to register with the Secretary of State and secure a card in order to solicit union membership. This Honorable Court restrained the enforcement of the provisions of that particular law, holding it was violative of the rights of a person to peacefully assemble and to advocate union membership, which this Court held to be a wholly lawful purpose. The Court, in that case, specifically found that there was no tendency to incite to unlawful action, nor were there any elements of present, clear

and immediate danger to public order and welfare. It will thus be appreciated from *Thompson v. Collins* that the assembly was peaceful and that the advocacy of unionism was a lawful one. *Cantwell v. Connecticut* involved two Jehovah Witnesses who were playing records to pedestrians with their permission and consent. This court found that they only wished to interest others in their propaganda. It found rights on the part of these Jehovah Witnesses to peacefully import their news. This Court found no showing that this deportment was noisy, overbearing or offensive. There was no crowd, disturbance or any impediment of traffic, and in effect, the Court found no invasion of the rights of the public or of the two pedestrians accosted. In Cantwell, this Court appropriately said:

> "No one would have the hardihood to suggest that the principal of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect . . . Where clear and present danger of riot, disorder, interference with traffic, upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to present or punish is obvious . . ."

This Honorable Court, in *Cantwell v. Connecticut*, recognized the concepts inherent in the first and fourteenth amendments as being the freedom to believe which this Court found to be absolute, and the freedom to act, which this Court found not to be absolute and to be restricted and limited to conduct that was subject to regulation for the protection of society.

Petitioner further cites the case of *Thompson v. Louisville*, 362 U.S. 199. In that case, the accused was charged with vagrancy under a Kentucky statute, the elements of which were that he had no visible means of support or satisfactory explanation of his presence, and that he did sleep, like, loaf or trespass on the premises in question without the consent of the owner thereof. The evidence in that case showed that there was no objection from the manager of the premises, although this accused had been in this particular cafe, the premises concerned, for over one-half hour. This Court held that the record was completely devoid of evidentiary support of this particular charge and, therefore, the conviction was violative of the due process clause of the Fourteenth Amendment. Respondent respectfully suggest that *Thompson v. Louisville* has no application to the case at bar.

The petitioner also cites in his petition the case of *Smith v. California*, 361 U. S. 147, 371 U. S. 415, in which case an ordinance dispensing with the element of scienter or knowledge by a bookseller of the contents of his books was held unconstitutional as placing too great a restriction upon the expression of a citizen. Respondent fails to see how the holding in this particular case, with reference to the facts under consideration, would have any bearing on the case at bar.

In arguing the alleged vagueness of LSA-R.S. 14:-103, petitioner cites the case of *Russell v. U. S.*, 369 U.S. 749. This case dealt with the refusal of a witness

to answer questions before a congressional committee. The indictment therein failed to identify and set forth the subject matter under inquiry at the time of the questioning, which was an essential element of the offense charged in the case. This Court properly held the bill of indictment insufficient in neglecting to aver that one particular essential element of the offense charged. Respondent fails to see how this particular case and the finding therein are appropriate to the case at bar.

SEVERAL DISTINCT OFFENSES, OR THE INTENT NECESSARY TO CONSTITUTE SUCH OFFENSES, DISJUNCTIVELY ENUMERATED IN THE SAME LAW OR IN THE SAME SECTION OF A CRIMINAL STATUTE, MAY BE CUMULATED IN THE SAME COUNT, WHEN IT APPEARS THAT THEY ARE CONNECTED WITH THE SAME TRANSACTION AND CONSTITUTE BUT ONE ACT, BUT IN THAT EVENT THEY MUST BE CHARGED CONJUNCTIVELY. (LSA-R.S. 15:-222)

18 USC, Rule 7 C, in part thereof, speaking of the bill of information, with reference to its nature and contents, provides:

> ". . . It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means . . ."

With the foregoing in view, this Honorable Court has held that if a statute embraces several separate

and distinct acts as a crime, an information or indictment in the language of the statute alleging more than one of the statutory offenses, is not duplicitous, if pleaded in the conjunctive. *Kitchens v. U. S.*, Ct. App. Wyoming 1959, 272 Fed. 2d 757, Certiorari denied, 80 Sup. Ct. 809, 362 U.S. 946, 4L. Ed. 2d 772. In view of the foregoing authorities, both state and federal, it will thus be readily seen that LSA-R.S. 14:-103, disturbing the peace, sets forth several separate and distinct acts by which said offense may be violated in the disjunctive and that the bill of information, conjunctively, factually and circumstantially charged a violation of subsections five and six thereof, which is permissible in view of the foregoing authorities. Despite the language contained in the bill of information which readily answers any questions as to what particular sections of LSA-R.S. 14·103 are violated, this petitioner maintains that this prosecution is based under LSA-R.S. 14:103(a) (7). In order to maintain that contention, it is necessary to completely ignore the factual averments of the bill of information in the light of LSA-R.S. 14:103. In order to sustain this contention, petitioner calls attention to mention of that alleged fact, that is, that this prosecution is under LSA-R.S. 14:103, in pleadings which he filed in various motions during the progress of this trial, which amount to nothing more than self-serving allegations which are in direct contradiction to the averments of the bill of information.

Petitioner contends further that he knew not

under what section of LSA-R.S. 14:103 he was charged and tried. A reading of the bill of information and transcript in this case would readily refute such contention. He further contends that he was tried and convicted among other sections, under LSA-R.S. 14:103 (a) (7), which he alleges to be unconstitutionally vague and citing *Stromberg v. California*, 283 U.S. 359, he urges that the whole proceedings should be nullified. This Honorable Court found that part of Section 403 A of the Penal Code of California, which was involved in Stromberg, was unconstitutional, although there were other parts which were connected therewith disjunctively which were valid. The Court, in the Stromberg case, found that the trial court in instructing the jury informed them that they could find the defendant guilty of either or any part of the general charge, which was conjunctively phrased. This Honorable Court found the judge's charge to the jury objectionable under a general verdict of guilty because it was not known whether the jury had found the defendant guilty under the unconstitutional part of said law or not. In the case at bar, the Stromberg case is inappropriate for the simple reason that the bill of information conjunctively charged this petitioner, and for the further reason that there is no indication that the judge, in considering the evidence and in arriving at his verdict, treated the bill of information disjunctively. As a matter of fact, the trial judge considered the bill of information as conjunctively charged. (See Transcript 28) Petitioner further contends that the statute under which

he was charged and prosecuted is unconstitutionally vague in that it does not fairly describe the conduct prohibited or provide an ascertainable standard of guilt, and therefore, is violative of the due process clause of the Fourteenth Amendment. This Honorable Court has held that a statute prohibiting the printing, publishing, editing, issuing, circulating, selling, etc., any books, papers, documents, encouraging or inciting a crime or breach of the peace or having the tendency to do so, valid as against a similar contention. *Fox v. Washington*, 236 U.S. 273, 35 Sup. Ct. 383, 59 Law Ed. 57.

Chaplinsky v. New Hampshire, 315 U. S. 568 held that Chapter 378, Section 2, of the Public Laws of New Hampshire, which reads as follows:

> ". . . No person shall address any offensive, derisive, or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name . . ."

constitutional as against a similar contention of vagueness. Also, this Honorable Court, in the case of *Irving Feiner, petitioner, v. The People of the State of New York*, 340 U.S. 268, at page 355 of this Court's decision, held that the New York Penal Law, Paragraph 722, which provides as follows:

> "Any person who, with the intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall have been deemed to have committed the offense of disorderly conduct:
>
> (1) . . .

(2) Acts in such a manner as to annoy, disturb, interfere with, obstruct or be offensive to others . . ."

was valid as against the contention of generality and violative of the First and Fourteenth Amendments of the United States Constitution.

SPEECH WHICH TENDS TO INFLICT INJURY OR WHICH INCITES TO RIOT OR IMMEDIATE BREACH OF THE PEACE IS NOT PROTECTED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION. (*People v. Feiner*, 1950, 91 NE 2d. 316, 300 N. Y. 391) *Chaplinsky v. State of New Hampshire*, 315 U. S. 568.

The evidence shows that petitioner told the students "let's go through the classrooms," (R-111) and also told them "we will go through the classrooms and, if necessary, we will pull them out of the classrooms" (R-63). The foregoing language by petitioner was to encourage his audience, students of Southern University, to be divided with other students who were attending Classes. He was urging a division in hostile camps. The speech was a deliberate, agitated and goaded effort to urge the crowd to action. Such language, in substance, in *State v. Feiner*, was held to be unprotected by the first amendment. Substantially, these were fighting words which not only tended to inflict injury and incite an immediate breach of the peace, but which actually did result in that action by the crowd. *Chaplinsky v. State of New Hampshire, supra.*

CONCLUSION

On review, this honorable Court looks at the whole proceedings below and determines independently the validity of petitioner's contentions in the light of the alleged constitutional rights violated. *Garner v. La.*, 368 U.S. 157. Petitioner in an effort to have his conviction reversed is urging this Honorable Court to view certain isolated remarks made by the trial judge during the course of the trial and isolated averments made by him in various pleadings filed in this proceeding, out of context. It is respectfully submitted that petitioner's conviction should be sustained on the basis of several sound, legal principles.

First, the speech he made had the tendency to, and actually did, urge others to riot, to a breach of the peace or a disturbance of the peace, by the conduct of the interruption of the classrooms in session. The words he used in the speech, regardless of the purpose of the speech, were fighting words and words that tended to create the crime with which he is charged.

Secondly, petitioner exhorted, encouraged, directed, urged and led some five hundred students to hold an unlawful assembly and to march through classes in session, all of which completely disrupted these lawful assemblies. His alleged advocacy was unlawful. It tended to incite others to riot, and did in fact, do so. The result was the disruption and interruption of classes in session by his marching demonstrator-audience, a result of which, as the procurer, he is as re-

sponsible as the doers. *Scherman v. State*, 115 Neb. 109, 112; 211 N. W. 613.

Thirdly, the right of the State to factually, circumstantially and conjunctively charge and try petitioner, in one count, on more than one factual violation of R.S. 14:103 has been established as being legally valid. R.S. 15:222, 18 USC, Rule 7.

Fourth, although it is true that the bill of information herein filed, upon which petitioner was charged and tried, contains averments of several factual violations of R.S. 14:103, they are properly conjunctively joined. Should this conviction be affirmed, petitioner should have no complaints for the State of Louisiana has only one opportunity to prosecute on this single transaction and, although in such prosecution, the state may, as it did in this case, join other charges based on the same factual situation, it may not have a succession of trials, seria tim. *U.S. v. Sabella*, Ct. of Appeals New York, 1959, 272 Fed. 2d 206.

The constitutional rights against double jeopardy guaranteed to this accused by the Fifth Amendment of the United States Constitution will protect him, if found guilty herein, of another prosecution under R.S. 14:103 on any conduct which may have arisen out of the general conduct in question, if evidence in the second trial would have been sufficient to warrant the conviction herein. *U.S. v. Kramer*, Ct. of App New York, 1961, 289 Fed. 2d 909.

For the reasons hereinabove contained, it is respectfully submitted the conviction herein should be sustained.

Respectfully submitted,

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